SUPREME COURT U.S.
JUN 24
JOHN F.

No. 238

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

RIDGEWOOD MANAGEMENT COMPANY, INC.,
Petitioner.

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, THE FIFTH CIRCUIT

JOHN H. BENCKENSTEIN
LIPSCOMB NORVELL, JR.
of
BENCKENSTEIN & NORVELL
P. O. Box 551
Beaumont, Texas 77704
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

SUBJECT INDEX

Opinions Below	1
Jurisdiction	2
Question Presented For Review	2
Statutes and Regulations Involved	3
Statement of the Case	3
Reasons for Granting the Writ	4
First Reason for Granting Writ	4
Second Reason for Granting Writ	7
Third Reason for Granting Writ	8
Conclusion	9
Affidavit of Service	9
Appendix A	A1
Appendix B	A23
Appendix C	A27
Appendix D	A31

List of Authorities

STATUTES

National Labor Relations Act –

Section 8(a)(1)	3, 4, 5, 8
Section 8(c)	3, 8

DECIDED CASES

Armco Steel Corporation v. *N.L.R.B.*, 344 F.2d 621 (1965)	6
May Department Stores Company v. *N.L.R.B.*, 316 F.2d 797 (1963)	6
N.L.R.B. v. *Rockwell Manufacturing Co.*, 271 F.2d 109 (1959 Third Circuit)	5, 7

N.L.R.B. v. *United Aircraft Corp., Pratt & Whitney Air Div.*, 324 F.2d 128 (1963) 5
N.L.R.B. v. *United Steelworkers of America*, 357 U.S. 357, 78 S.Ct. 1268 ..... 5, 6, 7, 8
Republic Aviation Corp. v. *N.L.R.B.*, 324 U.S. 793, 65 S.Ct. 982 (1945) 6
Serv-Air, Inc. v. *N.L.R.B.*, 395 F.2d 557 (10th Circuit 1968) 7
TRW, Inc., TRW Michigan Division v. *N.L.R.B.*, 393 F.2d 771 (1968 Sixth Circuit) 7
United Steelworkers of America v. *N.L.R.B.*, 393 F.2d 661 (District of Columbia 1968) 5

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

RIDGEWOOD MANAGEMENT COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, THE FIFTH CIRCUIT

Ridgewood Management Company, Inc., Petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The intermediate Decision of the trial examiner dated January 29, 1968 (Appendix A, infra, pp. A1-A23) is not officially reported; the opinion of the National Labor Relations Board entered May 1, 1968 (Appendix B, infra, pp. A23-A26) is reported in 171 N.L.R.B. No. 31. The opinion of the United States Court of Appeals entered March 21, 1969 (Appendix C, infra, pp. A27-A30) is not officially reported.

JURISDICTION

1. The Fifth Circuit's opinion was rendered on March 21, 1969, and the judgment of the Court entered on April 14, 1969.

2. A timely Petition for Rehearing was denied on May 13, 1969.

3. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. **Whether the Consideration of Available Alternative Means of the Union to Carry Their Messages to the Employees, and the Showing That the No-Solicitation Rule Truly Diminished the Ability of the Union to Carry Their Messages to the Employees, Is Relevant in an Employer's Promulgation of a No-Solicitation Rule During Working Hours, on Company Premises?**

2. **Whether a No-Solicitation Rule During Working Hours on Company Premises Should Be Held Invalid and in Violation of 8(a)(1) of the National Labor Relations Act, Because of Various Types of Solicitation by Employees Ranging from Candy Sales for Cub Scouts to Church Donations?**

3. **Whether a No-Solicitation Rule During Working Hours on Company Premises Should Be Held Invalid and in Violation of 8(a)(1) of the National Labor Relations Act Because Petitioner Permitted a Labor Consultant to Interview Employees on the Premises During Working Hours?**

4. **Was There Substantial Evidence to Support a Finding of an 8(a)(1) Violation of National Labor Relations Act by Promulgation of a No-Solicitation Rule During Working Hours, on Company Premises?**

STATUTES AND REGULATIONS INVOLVED

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C.A., Section 158, Page 326,

> "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;"

Section 8(c) of the National Labor Relations Act, 29 U.S.C.A., Section 158, Page 329,

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

STATEMENT OF THE CASE

This is a case pertaining to a promulgation of a no-solicitation rule during working hours, which was held in violation of Section 8(a)(1) of the National Labor Relations Act.

Petitioner is a Texas Corporation with its sole place of business in Beaumont, Texas. It is a motor hotel with rooms and a restaurant for guests.

On or about April 25, 1967, Petitioner posted the following no-solicitation rule:

> "No employee of the Ridgewood Motor Hotel is permitted to solicit union membership during working hours on the premises of Ridgewood Motor Hotel." (J.A. 46)

The no-solicitation rule was promulgated in order to maintain discipline and production. (J.A. 42) There was no

enforcement of the rule prior to or after the election. On May 19, 1967, an election was held, and the Union lost. On May 26, 1967, the Union filed objections to the election. The Regional Director on September 15, 1967, issued an order for hearing on all issues.

The matter came on for hearing, and was heard by the Trial Examiner, George J. Bott, who filed his decision finding against Petitioner, recommending that the election be set aside on the sole basis of the no-solicitation rule, to which Petitioner promptly filed its exceptions; and the National Labor Relations Board on May 1, 1968, adopted the findings, conclusions and recommendations of the trial examiner.

The Fifth Circuit Court of Appeals affirmed the order of the National Labor Relations Board's holding that there was substantial evidence of a violation of 8(a)(1) in promulgating a no-solicitation rule during working hours, on company premises, and concluded that, "The fact that there was no showing that the no-solicitation rule actually interfered with the Union's ability to communicate with the employees does not obviate this conclusion". A timely petition for rehearing was filed pertaining to the no-solicitation rule violation, and the same was denied on May 13, 1969.

REASONS FOR GRANTING THE WRIT

1. First Reason for Granting Writ

The question presented that of consideration of available alternative means of the Union to carry messages to the employees and the showing that the posted rule truly diminished the ability of the Union to communicate in a no-solicitation case during working hours on company premises, is of major importance to the employer, union and general counsel. The Fifth Circuit, District of

Columbia Circuit and Second Circuit are in conflict with a prior decision of this Court in *N.L.R.B.* v. *United Steelworkers of America*, 357 U.S. 357, 78 S.Ct. 1268, and the Sixth Circuit and Third Circuit.

Petitioner before the National Labor Relations Board and Fifth Circuit has continuously and vigorously raised the question of alternative means of the union to carry their messages to the employees and the failure of the general counsel to prove that the rule in question truly diminished the ability of the union to communicate. This Petitioner assumed a burden, although not required under *N.L.R.B.* v. *United Steelworkers of America* (Supra), and proved that the ability to communicate was not diminished. (J.A. 22, 27-28, 36) The Fifth Circuit citing the District of Columbia Circuit Case *United Steelworkers of America* v. *N.L.R.B.*, 393 F.2d 661 (1968) held that, "The fact there was no showing that the no-solicitation rule actually interfered with the Union's ability to communicate with the employees does not obviate this conclusion of a violation of 8(a)(1). See, e.g., United Steelworkers of America v. N.L.R.B., supra". *United Steelworkers of America* v. *N.L.R.B.* (Supra) held that:

> "In determining the validity of a no-solicitation rule, the availability of other avenues of communication is generally irrelevant".

The Second Circuit Case of *N.L.R.B.* v. *United Aircraft Corp., Pratt & Whitney Air Div.*, 324 F.2d 128 (1963) cited by the District of Columbia Circuit rejects, "the trilogy which forms Rockwell's foundation" in *N.L.R.B.* v. *Rockwell Manufacturing Co. (Du Bois Div.)*, 271 F.2d 109 (1959).

Petitioner contends that the question of available alternative means to carry union messages, and the showing

that the no-solicitation rule truly diminished the ability of the union to communicate, is a vital, controlling and ultimate question in a no-solicitation rule during working hours case. The general counsel, however, in their brief before the Fifth Circuit relied upon *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 65 S.Ct. 982 (1945) for authority that, "the availability of other avenues of communication is irrelevant". *Republic Aviation Corp.* v. *N.L.R.B.* (Supra) involves a promulgation and enforcement of a rule prohibiting solicitation, "of any type * * * in the factory or offices", and an employee was discharged for violating the rule on his own time during lunch period. This Court did not hold in *Republic Aviation Corp.* (Supra) as is contended by the Board that, "the availability of other avenues of communication is irrelevant".

Justice Frankfurter, delivering the opinion in *N.L.R.B.* v. *United Steelworkers* (Supra), concluded on Page 1272:

> "No attempt was made in either of these cases to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their message to the employees. Just as that is a vital consideration in determining the validity of a no-solicitation rule, see Republic Aviation Corp. v. National Labor Relations Board, supra, 324 U.S. at pages 797-798, 65 S.Ct. at pages 985-986; National Labor Relations Board v. Babcock & Wilcox Co., supra, 351 U.S. at page 112, 76 S.Ct. at page 684, it is highly relevant in determining whether a valid rule has been fairly applied".

Following the Court's decision in United Steelworkers of America, the Sixth Circuit in *Armco Steel Corporation* v. *N.L.R.B.*, 344 F.2d 621 (1965), a no distribution rule case, and in *May Department Stores Company* v. *N.L.R.B.*, 316 F.2d 797 (1963), a no-solicitation rule case, held that

the question of alternative means to carry union messages were relevant. In alignment with the Sixth Circuit is the Third Circuit case of *N.L.R.B.* v. *Rockwell Manufacturing Co.* (*Du Bois Div.*), 271 F.2d 109 (1959).

The Fifth Circuit Court of Appeals in the case at bar in agreement with the District of Columbia Circuit and Second Circuit disregards, or considers irrelevant the showing of alternative means of the union to carry their messages to the employees as a vital consideration in determining the validity of a no-solicitation rule, and in determining whether a valid rule has been fairly applied. *Since the issue or question of alternative means of communication continually arises, the conflict of the Circuit Courts and this Court's decision in N.L.R.B.* v. *United Steelworkers* (*Supra*) *should be resolved and clarified.*

2. Second Reason for Granting Writ

The Fifth Circuit in its opinion found that Petitioner's no-solicitation rule during working hours was discriminatory because of solicitations among the employees ranging from candy sales for cub scouts to church donations. Assuming that such solicitation was with the knowledge and permission of Petitioner, which is denied, the Fifth Circuit's finding is in conflict with the Sixth and Tenth Circuit Court of Appeals. In *TRW, Inc., TRW Michigan Division* v. *N.L.R.B.*, 393 F.2d 771 (1968 Sixth Circuit), solicitations for charitable purposes, semiannual raffle by the Pioneer Club, sale of government bonds, and contribution to deceased fellow employees were not evidence that the rule was adopted for a discriminatory purpose. The Sixth Circuit expressing the view that Union solicitation by its very nature may cause argument and diversion among employees. In alignment with the Sixth Circuit is the Tenth Circuit's holding in the case of *Serv-Air, Inc.* v. *N.L.R.B.*, 395 F.2d 557, 560 (10 Circuit 1968), that the

forms of solicitation in question were beneficent acts and fall far short of establishing forbidden discrimination. *Is the Petitioner by publishing a no-solicitation rule during working hours on company premises forbidden to condone beneficent acts by the employees of candy sales for cub scouts and church donations?*

3. Third Reason for Granting Writ

Of exceptional importance is the question of whether during a posted no-solicitation rule an employer and/or a labor consultant can interview employees on the premises during working hours in order to discuss the pros and cons of a union in a noncoercive nature, and be in violation of 8(a)(1). In the opinion of the Fifth Circuit, such act was a violation of 8(a)(1).

The Fifth Circuit's result is in conflict with Section 8(c) of the National Labor Relations Act, and this Court's decision in *N.L.R.B.* v. *United Steelworkers*, 78 S.Ct. 1268 (1958). Section 8(c) of 29 U.S.C.A., Section 158, reads as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit".

In the case of *N.L.R.B.* v. *United Steelworkers* (Supra), there was at issue, an enforcement of a no-solicitation rule by an employer, who at the same time was engaging in anti-union solicitation. Under the circumstances in that case, which are equally applicable to Petitioner, this Court held that there was no unfair labor practice. Petitioner's case is stronger because *there was no enforcement;* no employees were disciplined, threatened or

discharged. (See the Entire Record) No employee of the union requested the employer to relax or make an exception to the rule.

No attempt was made to show that the no-solicitation rule truly diminished the ability of the labor organizations involved to carry their messages to the employees.

Petitioner's anti-union solicitation was a protected activity within the meaning of the Act, and this Court should grant this writ to clarify the rights of the employer during a promulgation of a no-solicitation rule, on company premises during paid working hours.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

John H. Benckenstein

of
BENCKENSTEIN & NORVELL
P. O. Box 551
Beaumont, Texas 77704
Attorneys for Petitioner

I, John H. Benckenstein, Attorney for Petitioner, do hereby certify that service of a copy of the foregoing Petition for a Writ of Certiorari has been made on Respondent and Solicitor General, Department of Justice, Washington, D.C. 20530, by mail in accordance with Rule 33 of the Rules of this Court. Date this 23rd day of June, 1969.

John H. Benckenstein

APPENDIX A

TRIAL EXAMINER'S DECISION

(Number and Title Omitted)

Statement of the Case

GEORGE J. BOTT, Trial Examiner: Case 23-CA-2727 is before me pursuant to charges and amended charges filed on June 1 and June 12, 1967,[1] against Ridgewood Management Company, Inc., herein called the Company or Respondent, by Hotel, Motel, Restaurant and Club Employees Union, Local No. 750, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, and on a complaint issued by the General Counsel on September 6, 1967, alleging violations of Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act. Case 23-CA-2808 is before me on the basis of a charge filed by the Union on August 14, 1967, and a complaint issued on September 14, 1967, alleging violations of Section 8(a)(1) and (3) of the Act. Case 23-RC-2947 began with a petition for certification filed by the Union on March 27, 1967, upon which an election was conducted on May 19, 1967, pursuant to a stipulation for certification upon consent election. The Union lost the election 42 to 34, and, on May 26, 1967, filed timely objections to the election. On September 15, 1967, the Regional Director of the Board issued an order consolidating all cases for hearing. A hearing was held before me in Beaumont, Texas, on November 16 and 17, 1967. All parties were represented at the hearing, and, subsequent to the hearing, Respondent and General Counsel filed briefs which I have considered.

---

1. The first charge alleged violations of Section 8(a)(1) of the Act only, and the amended charge added a refusal-to-bargain allegation under Section 8(a)(5), but, as indicated, the General Counsel's complaint alleged violations of Section 8(a)(1) of the Act only.

Upon the entire record[2] in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's Business

Respondent is a Texas corporation which operates a motor hotel in Beaumont, Texas, the facility involved in this proceeding. During the 12 months prior to the issuance of the complaint, Respondent received gross revenue in excess of $500,000 from its motor hotel operations. During the same period, Respondent purchased and received goods valued in excess of $1,000 which goods were shipped directly to it from points outside the State of Texas.

Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Sufficiency of the Charges to Support the Complaint*

The complaints in 23-CA-2727 and in 23-CA-2808 allege various violations of Section 8(a)(1) of the Act, such as coercive interrogation of employees, compulsory anti-union meetings under threat of discharge, discriminatory application of a no-solicitation rule, a threat to close the business on account of the Union, and creating the impression of surveillance of union activities. In its answers, Respondent attacked the sufficiency of the charges to sup-

2. Respondent's unopposed motion to correct the transcript is hereby granted.

port these allegations, and at the hearing moved to dismiss them. The charges in 23-CA-2727 contain the allegation that "the above-named Employer interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act" in violation of Section 8(a)(1) of the Act, and the charge in 23-CA-2808 contains a like allegation. Charges of this nature have been held adequate to support a complaint alleging specific acts violative of Section 8(a)(1) of the Act. I denied the motion to dismiss at the hearing, and I hereby renew my ruling.[3]

B. *Interrogation of Employees*

The union activity at Respondent appears to have begun in earnest in February 1967 and was continuing in March, Clay M. Kinnaird, Respondent's president and general manager, returned from a short vacation on March 12 and, on March 14, he held a meeting of dining room employees. Lanelle Barber, a waitress, testified that she learned of the meeting from a bulletin posted in her department, and attended along with the other waitresses. There were about 11 persons present, including Kinnaird, Georgia Martin, resident manager, and Billie Adams, a hostess whose duties include supervision of the dining room.

According to Barber, Kinnaird told the group that he had heard that the Union was organizing the employees and he wanted to find out about it. First he asked the employees generally if any of them had signed union cards or paid initiation fees, but when he got no responses, he canvassed each employee individually asking the same questions. All the employees denied having signed a card

3. *Texas Industries, Inc.* v. *N.L.R.B.*, 336 F.2d 128, 132 (C.A. 5); *N.L.R.B.* v. *Reliance Steel Products Company*, 322 F.2d 49, 52 (C.A. 5).

or paid an initiation fee. In addition to asking whether employees had signed cards, Kinnaird asked some of them if they would join the Union if they were solicited. It appears from Barber's testimony that Kinnaird accompanied his questions with comments unfavorable to unions. Also, according to Barber, Kinnaird told the employees that they would have to remain in the room until he got to the "bottom of this."

Waitress Viola Day joined the Union in February, and she attended the March 14 meeting which Kinnaird called. She also said that Kinnaird asked each person separately if she had signed a "petition to join the Union" or knew of any union organizing.

Uina Shafer testified that Kinnaird stated that he had heard that a union petition had been circulated and that the employees had been solicited by some person to join and pay a fee. Shafer said Kinnaird, first addressing his inquiry to the whole gathering, asked if the employees had "talked to this man and had signed any papers." Shafer said that "of course, we all said no." Kinnaird made some critical comments about the Union and then asked each employee individually if she had signed anything for the union or paid a 5-dollar fee, but each employee denied having signed or paid anything. Shafer also said Kinnaird stated that "he was going to get to the bottom of it and that no one was going to leave the room until he did find out what this was all about, and if there was a union to be formed or trying to be formed."

Waitress Billie Olsen corroborated the others in essentials. Kinnaird told the group that he had heard that someone was circulating a union petition and wanted to know if anyone had signed it. Olsen said all employees disavowed any union activity, and Kinnaird then questioned them individually. Kinnaird asked Olsen if she

would sign a union card in the future, and she replied that she did not know. Kinnaird also made some derogatory remark to the effect that those who belong to unions are "nothing but poor white trash or scum."

Kinnaird testified that he assembled the employees because he noticed a changed atmosphere and a different attitude among employees when he returned from his short vacation. Although he denied questioning employees about their union activities, I credit the employees, and find that he interrogated them as they described it. The employees appeared to be giving straightforward accounts of the meeting without exaggeration. Kinnaird's version, on the other hand, was not as clear, direct, and positive as it ought to have been to warrant discrediting the employees' versions. Kinnaird conceded, for example, that he could not recall his opening remarks and was "more or less fishing around" to find out what had happened during his absence. He admitted that he did ask the employees whether or not there was something "wrong" that they wanted to talk about and that, just before adjournment, he asked each employee if she had "something to say before we adjourned." It is also significant that Georgia Martin, the resident manager who was present at the meeting, had absolutely no recollection of what Kinnaird said, and Billie Adams, supervisor of waitresses who was also there, did not testify.

I find that Kinnaird, motivated at the least by rumors of union activity at the motel which he was admittedly aware of, asked employees collectively and individually what they knew about union organizing and whether they had been solicited for the Union or paid an initiation fee; that he also questioned Barber and Olsen about their future intentions with respect to signing union cards; that he forcefully insisted that the employees answer his ques-

tions, and accompanied his interrogation of them with antiunion statements.

Respondent had no legitimate reason for interrogating employees about signing union cards, being approached by the Union, paying fees to the Union, or especially regarding their intentions respecting the Union. Kinnaird's interrogation was not accompanied by assurances that there would be no reprisals, but, in fact, the very atmosphere, conditioned as it was by individual as well as general inquiries, accompanied by statements that the employees would be required to remain in the room until Respondent "got to the bottom" of the problem, was coercive. By such conduct, Respondent violated Section 8(a)(1) of the Act.[4]

C. *Forcing Employees to Attend Antiunion Meetings Under Pain of Discharge*

The complaint in 23-CA-2727 alleges that Respondent required its employees to attend antiunion meetings and threatened them with discharge if they did not attend. It was stipulated that there were four general meetings of employees called by the Respondent on March 22, May 4, May 11, and May 17, respectively, all before the Board election, and it is also clear that at these meetings Respondent tried to persuade the employees to reject the Union.[5] Respondent denies, however, that anyone was forced to par-

4. *N.L.R.B.* v. *Camco, Inc.*, 340 F.2d 803 (C.A. 5); *Bourne Co.*, v. *N.L.R.B.*, 332 F.2d 47, 48 (C.A. 2).

5. The meetings were clearly antiunion in tone, but there is no allegation in the Union's objections to conduct of election, in Case 23-RC-2947, that Respondent made any statements at the meetings violative of Section 8(a)(1) of the Act or which otherwise interfered with the election. However, there is an allegation in the complaint in Case 23-CA-2808 that Kinnaird told employees at the May 17 meeting that he would shut down the business if a majority of them designated the Union. This allegation is discussed in greater detail in section III, E, *infra*, and found to have no merit.

ticipate in the meetings or was threatened with discharge if he did not attend.

Employees were notified of meetings by a notice posted on bulletin boards in the various departments of the motel. The written notice was not produced, and I find, in accord with employee Barber's testimony, that the notice read that "all employees must attend." I also find, in the light of Barber's testimony which was corroborated by employee Day, that there was a rollcall at the meetings and the names of those in attendance were recorded.

Employee Uina Shafer was unable to attend the March 22 employee meeting, which was held after her quitting time, because of a previous personal commitment. She told Martin, the resident manager, about her problem, but Martin told her the meeting was important, that Kinnaird wanted them present, and to see him about it. Shafer spoke with Kinnaird, who told her to make other arrangements to take care of her other engagement. Shafer protested that it was impossible to make other plans, and she said that Kinnaird asked her if she thought her job was important and suggested that she should remember that it was, or she would be without employment. Shafer did not attend the employee meeting on March 22, or the last two, but she conceded that she was not fired or disciplined in any way.

Before one of the employee meetings, Billie Olsen then employed as a waitress, told Martin that she could not attend, but, according to her, Martin answered that she "had to go or else." She also testified that she heard Martin tell Willie Mae Wilson, who had just complained that she had a babysitter problem and couldn't remain for the meeting, that "you will attend this meeting or you won't have a job tomorrow."[6]

6. Wilson did not testify.

Martin said she did not recall telling Olsen that she must attend the employee meetings, but she maintained that she did not threaten her with discharge if she did not. Kinnaird testified that he tried to impress upon employees the importance of the meetings at which he and other company representatives gave Respondent's position regarding the Union's efforts to organize the employees, but he said that he did not insist that employees attend under penalty of discharge. He pointed out that there was substantially less than full attendance at the meetings, but no one was reprimanded or disciplined for not attending. He specifically denied that he told employee Shafer that if she failed to appear at one of the employee meetings she would not have a job.

Although there is no evidence that any employee was disciplined in any way for failure to attend the meetings held by Respondent before the election, and although a number of employees testified that no one threatened them with discharge if they did not attend, I find that Respondent conveyed to employees the thought that attendance was compulsory and implied at least that employees might reap management's displeasure if they ignored the meetings. It is likely that Martin and Kinnaird did not use the word discharge in their conversations with Olsen and Shafer, but I have no reason to doubt the testimony of the employees that these officials forcefully suggested that their jobs might be in jeopardy if they did not appear. I find that Martin told Olsen to attend "or else," and that Kinnaird emphasized to Shafer the possibility of unemployment in the event of non-attendance at management's employee meetings. Regardless of what specific words were used, Respondent made it clear to employees that there was a risk in non-attendance.

It has long been held that compelling employees during working hours to attend meetings and listen to anti-

union speeches is not a violation of the Act if the speeches are otherwise protected by Section 8(c) of the Act. In *Babcock & Wilson Co.*[7] the Board held that even if the respondent had compelled its employees to listen to non-coercive antiunion speeches during working hours this did not violate the Act. It would appear that an element of compulsion is present in all "captive audience" speeches, and the fact that employees have no choice but to listen does not of itself make remarks otherwise protected by Section 8(c) of the Act illegal.[7] I find, at least in the circumstances of this case, including the facts that many employees did not attend the speeches, that there were no reprimands issued or discipline imposed for non-attendance, even in regard to those who testified that Respondent insisted that they attend, and that other employee witnesses did not understand that there would be any penalty for non-attendance, that Respondent did not violate Section 8(a)(1) of the Act by suggesting to some employees that non-attendance might put their jobs in jeopardy.[8]

---

7. 77 NLRB 577; see also *Livingston Shirt Corporation*, 107 NLRB 400; *Peerless Plywood Company*, 107 NLRB 427. In *Robbins Packing Corp.*, 115 NLRB 1429, the Board, in finding a supervisor's talk to employees during the 24-hour period prior to an election to be improper, noted that the supervisor did not indicate to the employees that their attendance was voluntary, the implication clearly being that there is no requirement that attendance be voluntary if the speeches do not violate the 24-hour rule in *Peerless Plywood*.

8. For similar reasons I find nothing improper under the cases in the calling of the roll of employees at the meetings. If attendance may be compelled, non-attendance may be noted. Also, contrary to General Counsel's contention, there was nothing improper in the way Respondent handled the question of payment for attendance. Kinnaird credibly testified that he instructed the bookkeeper to pay all employees who did not clock out, and there is no evidence of any weight that any employee was forced to attend on his own, unpaid time.

D. *Respondent's No-solicitation Rule*

On April 25, 1967, Respondent posted a rule which read:

All Employees Take Notice:

No Employee of Ridgewood Motor Hotel is Permitted To Solicit Union Membership During Working Hours On The Premises Of Ridgewood Motor Hotel

Before April 25, Respondent had no rule against solicitation of any kind. Kinnaird explained the initiation of the rule on the grounds that he had observed groups of employees talking at work and, although he did not know what they were talking about he assumed it was about the Union. He said it was his regular practice to tour all departments, and that customers were being neglected by the staff in all departments of the motel. He said he also noticed "a little friction" among the employees, since some were for the Union and some were against it, and this was an additional reason for posting the rule. After its introduction, the rule was enforced, he said, but there were no employee violations. The rule was taken down from the bulletin boards on May 19, 1967, the day of the Board election.

Although Respondent's rule against solicitation was aimed only at solicitation for the Union, the record shows that solicitations for other purposes were frequently and openly permitted. Even in the public areas of the motel there were, for example, candy sales, cake sales, solicitation of contributions for gifts for departing employees and flowers for the departed, church donations and football pools, as well as Christmas gifts for supervisors. In addition, outside salesmen are permitted to visit and attempt to sell employees, such as waitresses or other dining room help, various commercial articles during working hours.[9]

9. Undenied and credited testimony of employees Barber, Day and Olsen.

In *Walton Manufacturing Company*, 126 NLRB 697, the Board held that rules prohibiting union solicitation by employees during working hours are presumptively valid as to their promulgation and enforcement but that these presumptions may be overcome by evidence establishing a "discriminatory purpose" in the adoption of the rule, or by evidence establishing an "unfair" application of the rule. Respondent's rule is presumptively valid on its face, for it prohibits union activity during working hours only. For a number of reasons, however, I find that the presumption of validity has been rebutted, and that the rule was discriminatory in intent and unfairly applied. The rule, in my opinion, was designed to stifle the Union's campaign to organize the employees and was not necessary to maintain efficiency, order, or discipline. As such, the rule was unlawful.

In the first place, I do not credit Kinnaird's testimony that he invoked the rule because employees were gathering in "little bunches" and customers were being neglected in the "dining room, kitchen and housekeeping" departments. Previously, I have refused to accept Kinnaird's account of why he interrogated the waitresses on March 14, and credited the employees instead, and I find the same defects in his testimony on this issue. Kinnaird was very general and somewhat vague and, as in the interrogation phase of the case, he was uncorroborated by Martin, the resident manager, whom I considered to be a particularly credible witness, and who, as resident manager, would have been in a position to know something about employee derelictions and customer complaints. In addition, on this point, General Counsel's witnesses testified without contradiction that they were not reprimanded in any way for failure to perform their duties properly prior to the institution of the no-solicitation rule.

The timing of the rule is also significant. It was imposed suddenly and during the commencement of the Union's campaign, and it was annulled as soon as the Union lost the Board election. Moreover, the rule was aimed only at the employees' union activities, and the record is clear that Respondent openly and freely permitted other solicitations by employees and outside salesmen of employees during working hours. Finally, during the last few weeks before the election, Respondent engaged in a campaign for employee support against the Union during working hours. Resident Manager Martin, accompanied by Shawd, a labor relations consultant, interviewed employees in public areas of the motel, during the employees' working hours, in order to persuade them that a union was not necessary at Respondent. I find and conclude, on the basis of these factors, that Respondent violated Section 8 (a) (1) of the Act by promulgating and enforcing the no-solicitation rule.[10]

E. *The Alleged Unfair Labor Practices in Case 23-CA-2808*

The complaint alleged that Kinnaird threatened to shut down the Respondent's business if a majority of the employees designated the Union as their collective-bargaining representative in the forthcoming election. Lanelle Barber, whose testimony I have previously credited in connection with the issue of Kinnaird's interrogation of the waitresses on March 14, testified that during the May

10. *The Wm. H. Block Company*, 150 NLRB 341. In this case the Board also disposed of the contention, which Respondent also makes in this case, that before such a rule may be found to be violative of the Act it must be found that the union demanded an exception be made to it, and that enforcement of the rule diminished the ability of the union to reach the employees. The Board held that such considerations are irrelevant where the validity of the rule itself is in question. See also, *General Aniline & Film Corporation*, 145 NLRB 1215; *United Aircraft Corporation, Pratt & Whitney Aircraft Division*, 139 NLRB 39, enfd. 324 F.2d 128 (C.A. 2).

17 general meeting of all employees called by Kinnaird just before the election, Kinnaird stated that "he had lost money the first five years that he was there, and now that the place was beginning to make money that he wasn't going to stand by and see somebody else come in and tell him how to run it, and before he did that he would close the front doors."

No other employee testified that Kinnaird made the remark attributed to him by Barber, and Kinnaird denied it. Martin testified that Kinnaird told Barber on August 14, as described in more detail below, that he would not permit her to run his business, but said he made no threats about closing down the business. She was also present at the May 17 meeting and could recall no threats of any kind by Kinnaird. Employee Jimmy Smith testified that he attended the employee meetings before the election, and he denied that Kinnaird stated that the hotel would be closed if the union were voted in by the employees.

I credit the testimony of Kinnaird, Martin, and Smith in this instance, and I find that General Counsel has not established by a preponderance of the evidence that Kinnaird threatened to close the business if the employees chose the Union, as alleged in the complaint.

The complaint in this case also alleged that "On or about August 12, 1967, Clay M. Kinnaird told employees that he had knowledge of their Union activities, thereby creating the impression of surveillance," and any evidence to support this allegation must be found in the testimony of Lanelle Barber. Barber testified that on August 12 Kinnaird summoned her to his office where the following conversation took place. According to her, Kinnaird opened the discussion by stating, "Lanelle, I know that you're union, and that there have been union meetings . . . and I know that you think that there is going to be a union

coming in, but God damit, there isn't." Barber asked Kinnaird what his comments had to do with her being called to his office, and he replied that he knew that she was "trying to get his help out and get" union help in the motel, which she denied.

At this point, according to Barber, Kinnaird said that there were a number of matters he wanted to discuss. Apparently Barber interrupted Kinnaird to tell him that she had heard that he had stated that he didn't want Barber's husband, a nonemployee, in the restaurant. She said Kinnaird denied having made such a complaint, but added that, since Barber had raised the issue, he wanted her to know that he did not want Mr. Barber present in the restaurant.

The conversation turned next to problems with respect to the restaurant service counter. At the time there were a number of waitresses, including Barber, who were in charge of groups of tables, and a counter girl permanently assigned to the counter. Barber said that Kinnaird complained that the waitresses had been loafing in a booth while the counter girl was overworked, and that he intended to stop this practice. Barber asked Kinnaird why he was singling her out, and he replied that if he had known that another waitress was on duty he would have had her in the office too. Kinnaird commented that the waitresses did not realize how much extra work the counter involved, and Barber replied that she had worked at the counter in the past. At this point, according to her, Kinnaird responded, "O.K., starting Monday morning you are on it again." On Monday, August 14, Barber began working at the counter, and, thereafter, she and the other dining room waitresses were each required to perform a week's work at the counter on a rotating basis. The complaint in this case also alleges that Barber's and the others' as-

signments to the counter on a rotating basis was a reprisal against Barber because of her union activities in violation of Section 8(a)(1) and (3) of the Act in her case, and a violation of Section 8(a)(1) with respect to the other waitresses.

Kinnaird explained his conversation with Barber and the institution of the rotation system as follows: The waitress who works the restaurant counter has duties in addition to those of the other waitresses, such as preparing coffee and orange juice, and the counter is generally busier than the rest of the room because the customers want fast service. Counter waitresses had complained about their working conditions to Kinnaird in the past, noting that, although they had no time to take a coffeebreak, the dining room waitresses had time to loaf together in an empty booth. Kinnaird said that, because of these conditions and other related grievances, he had difficulty finding someone to work the counter, and the last counter girl had just quit. He discussed the problem with Martin and decided to talk with Barber about it. When Barber arrived he mentioned some of the problems with the counter and told her that he wanted her to help service it on a rotating basis. Barber suggested another person be hired in the place of the counter waitress who had quit, but Kinnaird decided against it. He said that, after he told Barber that she would start work at the counter, Barber asked him if he wanted her to quit. He said he told her that he did not, and Barber accepted the assignment. The system of rotation on a weekly basis is still in effect and the employees are pleased with it, he said. Some of the dining room tables have been added to the counter, thereby giving the counter girl a better income. Kinnaird stated that none of the employees have suffered financially because of the new system.

Kinnaird denied that he had used profanity in reference to Barber's union activities, as she had testified. He explained that during the conversation Barber's husband's name was mentioned, and he told Barber to keep her husband away from the restaurant, using profanity in that connection. He also denied that he threatened Barber in any way or told her that she was trying to get rid of the present employees in order to replace them with union help. He did not deny, however, that he had told Barber that he knew she was a member of the union and that there had been union meetings held.

Martin was present when Kinnaird spoke with Barber, and she corroborated him in all essentials in respect to what was said and the reason for the change in operations. Mrs. Petrie, the counter waitress, had just quit her employment, and she had complained about what appeared to be unfair working conditions in the dining room. Petrie and other waitresses had also complained about the interfering and officious attitude of Mrs. Barber's husband, who, although not an employee of Respondent, came to work with Mrs. Barber and did some chores in the dining room area. Kinnaird decided that all waitresses would take a turn at the counter in the future, and he told Barber that she would start on Monday. Martin was not sure that Kinnaird explained to Barber at that time that the assignment would be rotated, but that is the way the system operates, and employees have commented favorably on it to her. Martin said Kinnaird's profanity was directed towards Mr. Barber's activities in the dining room, and Kinnaird told Mrs. Barber that he did not intend to let her run his business.

In the context of Kinnaird's reference to Barber's union activities, his sudden assignment of her alone to less attractive and remunerative work would make out a prima

facie case of discrimination.[11] But whether or not Kinnaird told Barber on Saturday, August 12, that on Monday, August 14, she would begin the rotation system, I find on the basis of Kinnaird's and Martin's testimony, that such was management's intention, and that the plan was actually installed and Barber made aware of it, as she admitted, no later than Monday morning. I also find that the system is working successfully from management's point of view, that there is no evidence of employee dissatisfaction with it, and that no employee has suffered financially as a result of it. In addition, I find, as testified to by Kinnaird and corroborated by Martin, that Kinnaird was referring to Mr. Barber when he used profanity and not to the Union. Although these findings still leave Kinnaird's reference to Barber's union activities as a prelude to his assignment of her to new duties, I find his remarks insufficient to overcome Respondent's logical explanation of its institution of a new method for servicing its dining room. On the basis of the entire record, therefore, I find that General Counsel has not established by a preponderance of the evidence that Barber's new assignment and the change in duties of the other waitresses was in violation of Section 8(a)(1) and (3) of the Act.

Kinnaird's conversation with Barber on August 12, 1967, occurred almost 3 months after the Board election at which Barber had acted as a union observer. In addition to her ordinary union activities, Barber had at one time been nominated to run for office in the Union, and all these facts were well known. In the circumstances, I cannot see how Kinnaird's statement to Barber that he knew she was "union, and that there have been union meetings," uttered to her in private, could have created the impression that Kinnaird was keeping her activities or those of

11. The work was admittedly more difficult, and Mrs. Barber testified that she made less money at it.

others under surveillance. I find that this allegation of the complaint has not been established by a preponderance of the evidence and that Respondent did not violate Section 8(a)(1) by Kinnaird's statements to Barber.[12]

F. *Findings and Conclusions With Respect to the Objections to the Election*

The Regional Director ordered a hearing on the Union's objection to the election, in Case 23-RC-2947, and consolidated the matter with the complaint cases for hearing. One of the Union's objections is based upon Respondent's institution of the no-solicitation rule prior to the election. I have previously found that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule against solicitation of union membership. The existence and enforcement of such a rule was designed to and necessarily does hamper legitimate organizational activity of employees and infringes upon the laboratory conditions which the Board seeks to establish during an election. I shall therefore recommend that the election be set aside on that basis alone.[13]

The Union also objected to the meetings of employees which Respondent held prior to the election on the grounds that employees were required to attend under threat of discharge and because employees had to attend on their own time. The complaint also charged this conduct as being violative of the Act, but I have previously found that there was no violation in the circumstances of this case. I find it unnecessary to decide whether this conduct, taken in connection with Respondent's illegal no-solicitation rule, is another reason for setting the election aside.[14]

---

12. *Ore-Ida Potato Products, Inc.*, 123 NLRB 1037.

13. *Edmont, Inc.*, 139 NLRB 1528; *Mallory Capacitor Company*, 167 NLRB No. 89.

14. See *Livingston Shirt Corporation*, 107 NLRB 400; *Peerless Plywood Company*, 107 NLRB 427; *Montgomery Ward & Co., Inc.*, 145 NLRB 846, enfd. 339 F.2d 889 (C.A. 6).

The Union's objection (c) alleges that "Management throughout the last weeks badgered employees singularly while on the job." This objection may not have been adequately developed at the hearing or it may refer to the fact that after Respondent posted the no-solicitation rule it also required waitresses, contrary to past practice, to remain on their stations, not to gather in groups for coffee-breaks in the dining room, but to eat alone. This conduct may very well have been another indication that Respondent's no-solicitation rule was discriminatorily motivated because Respondent was attempting to prevent union conversation among the waitresses, but, in my opinion, it does not amount to "badger(ing) employees singularly" so as to justify a separate or additional ground for setting aside the election.[15]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found, as set forth above, that Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and from like or related conduct and take certain affirmative action, set forth below, designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

15. Two of the Union's objections, namely, (e) and (f), were withdrawn prior to the hearing.

Conclusions of Law

1. The Respondent Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) 35 of the Act.

3. By the conduct set forth in section III which has been found to constitute unfair labor practices, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 2(5) of the Act.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that:

Respondent Ridgewood Management Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their membership in or activities on behalf of the Union.

(b) Posting, maintaining, or enforcing any rules against union solicitation which are designed solely to impede the union organization of its employees.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in con-

certed activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the April 25, 1967, no-solicitation rule.

(b) Post at its Beaumont, Texas, motor hotel involved herein, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent or its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith.[17]

IT IS FURTHER RECOMMENDED that the election held on May 19, 1967, in Case 23-RC-2947, be set aside, and that said case be remanded to the Regional Director

16. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

17. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 23, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

for Region 23 of the Board to conduct a new election at such time as he deems the circumstances permit the free choice of a bargaining representative.

Dated at Washington, D.C. Jan. 29, 1968
Certified True Copy
O. W. Fields
Executive Secretary, NLRB

Date Jan. 29, 1968

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT coercively interrogate our employees concerning their union membership, activities, or desires.

WE HAVE rescinded against solicitation for unions which we posted on April 25, 1967.

WE WILL NOT publish or maintain in effect any rule limiting solicitation on behalf of any union in order to impede the organization of our employees.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist Hotel, Motel, Restaurant and Club Employees Union, Local No. 750, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, or any other labor organization, to bargain collectively through represent-

atives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

Ridgewood Management Company, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas 77002, Telephone 228-9611.

APPENDIX B

171 NLRB No. 31 D-870
Beaumont, Texas

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

(Number and Title Omitted)

On January 29, 1968, Trial Examiner George J. Bott issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, recommending that it cease and desist therefrom and take certain affirmative action, and finding that the Respondent had interfered with the election of May 19, 1967, and recommending that

it be set aside, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain unfair labor practices alleged, without specifically recommending dismissal of such allegations. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner except to the extent modified.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Ridgewood Management Company, Inc., Beaumont, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

1: In the absence of exceptions, we adopt *pro forma* the Trial Examiner's finding that the Respondent did not violate Section 8(a)(1) by suggesting to some employees that their jobs might be in jeopardy if they did not attend anti-union meetings scheduled to be held after their shifts were completed, and by making it clear to employee Shafer that there would be a risk in non-attendance at the March 22 meeting, where the Respondent engaged in coercive interrogation unprotected by Section 8(c), even though Shafer did not attend and was not actually disciplined for non-attendance.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed in so far as it alleges a violation of Section 8(a)(3) as to Barber and violations of Section 8(a)(1) not found by the Trial Examiner.

IT IS FURTHER ORDERED that the election in Case No. 23-RC-2947 be, and it hereby is, set aside.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate in Case No. 23-RC-2947, at such time as the Regional Director deems that circumstances permit the employees free choice of a bargaining representative. The Regional Director for Region 23 shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the

election date and who have been permanently replaced.[2] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Hotel, Motel, Restaurant and Club Employees Union, Local No. 750, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

Dated, Washington, D. C. May 1, 1968

.....

John H. Fanning, Member

.....

Howard Jenkins, Jr., Member

.....

Sam Zagoria, Member
National Labor Relations Board

(Seal)

2. An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 23 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26151

RIDGEWOOD MANAGEMENT COMPANY, INC.,
Petitioner-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Petitioner.

(AND REVERSE TITLE)

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(March 21, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and MITCHELL, District Judge.

AINSWORTH, Circuit Judge: This action is before the Court upon the petition of Ridgewood Management Company, Inc. (Employer) to review and modify an order of the National Labor Relations Board. The Board has cross-petitioned for enforcement. After a thorough consideration of the Employer's contentions, we hold that there is substantial evidence to support the Board's findings and conclusions.

The Hotel, Motel, Restaurant and Club Employees Union, Local 750 (Union), began a campaign to organize Petitioner's employees in February 1967. On March 14, 1967, Clay Kinnaird, president and general manager of Ridgewood, became aware of rumors of union activity and held a meeting which was attended by some ten or eleven dining-room employees. According to the testimony of employees Barber, Day, Shafer and Olsen, which was credited by the Trial Examiner and the Board, Kinnaird questioned the employees collectively and individually about their union activities, including the signing of authorization cards and the payment of initiation fees. Although two employees had joined the Union, all of the employees denied having engaged in union activity. In addition, Kinnaird deprecated persons who belong to unions, and added that the employees would be required to remain in the room until he "got to the bottom" of the Union problem.

Employer interrogation of employees is not illegal per se, and such interrogation is proscribed by Section 8. (a) (1) of the National Labor Relations Act "Only when the interrogation tends to restrain, coerce or interfere with employees in the exercise of their rights under the Act . . . ." *N.L.R.B.* v. *Sunnyland Packing Company*, 5 Cir., 1966, 369 F 2d 787, 793. See also *N.L.R.B.* v. *Neuhoff Bros., Packers, Inc.*, 5 Cir., 1967, 375 F 2d 372, 377. See generally Note, *Labor-Law — Employer Interrogation*, 29 La. L. Rev. 154 (1968). However, interrogation by an employer may be a very subtle weapon for interfering with employee rights, and hence, in assessing the impact of the interrogation, courts must examine, inter alia, the identity of the questioner, the background of the employer's attitude toward the Union, the method of interrogation, and whether or not intimidation was evidenced by untruthful employee

answers. *N.L.R.B.* v. *Camco, Incorporated*, 5 Cir., 1965, 340 F 2d 803, 804; *N.L.R.B.* v. *Milco, Inc.*, 2 Cir., 1968, 388 F 2d 133, 137. Applying these criteria to the facts of this case, and considering that credibility choices are within the province of the Board, see, e.g., *Independent, Inc.* v. *N.L.R.B.*, 5 Cir., 1969, ... F 2d ....., p. 4 [No. 24901, January 22], the Board's cease and desist order is supported by substantial evidence. See also *N.L.R.B.* v. *Great Atlantic & Pacific Tea Company*, 5 Cir., 1965, 346 F 2d 936, 938. Having reached this conclusion, it is unnecessary that we pass on the question of whether the Employer failed specifically to challenge the Trial Examiner's findings and conclusions before the Board so as to preclude the Employer from raising the interrogation issue here 29 U.S.C. § 160(e). See, e.g., *N.L.R.B.* v. *Lone Star Textiles, Inc., Guadalupe Val. Cotton M. D.*, 5 Cir., 1967, 386 F 2d 535, 537.

Finally, the Board found that the Employer had violated Section 8 (a) (1) by posting a no-solicitation notice which barred solicitation of Union memberships during working hours. A no-solicitation rule which is operative only during working hours is valid if it is premised upon the necessity to maintain discipline and production, and if the prohibition is not adopted for a discriminatory purpose. *N.L.R.B.* v. *Hill & Hill Truck Line, Inc.*, 5 Cir., 1959, 266 F 2d 883, 886; *United Steelworkers of America* v. *N.L.R.B.*, D. C. Cir., 1968, 393 F 2d 661, 663; *Serv-Air, Inc.* v. *N.L.R.B.*, 10 Cir., 1968, 395 F 2d 557, 560. In the present case, the Board found that various types of solicitations, ranging from candy sales to church donations, had been permitted in the public areas of the Employer's premises. Furthermore, and most significantly, the Employer permitted its Resident Manager and a labor relations con-

sultant to interview employees on the premises during working hours in order to persuade them not to unionize. Under these circumstances, the Board's conclusion that the Employer's no-solicitation rule was discriminatory and in violation of Section 8 (a) (1) clearly is supported by substantial evidence. *United Steelworkers of America* v. *N.L.R.B.*, supra; *N.L.R.B.* v. *Electro Plastic Fabrics, Inc.*, 4 Cir., 1967, 381 F 2d 374, 376, Cf. *Serv-Air, Inc.* v. *N.L.R.B.*, supra. The fact that there was no showing that the no-solicitation rule actually interfered with the Union's ability to communicate with the employees does not obviate this conclusion. See, e.g., *United Steelworkers of America* v. *N.L.R.B.*, supra.

ENFORCED

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26151

RIDGEWOOD MANAGEMENT COMPANY, INC.,
Petitioner-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Petitioner.

(AND REVERSE TITLE)

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(May 13, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and MITCHELL, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUL 28 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

RIDGEWOOD MANAGEMENT COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MICHAEL F. ROSENBLUM,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 278

RIDGEWOOD MANAGEMENT COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27-30) has not yet been officially reported. The Board's decision and order (Pet. App. 1-26) are reported at 171 NLRB No. 31.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1969 (Pet. App. 27-30), and a petition

for rehearing was denied on May 13, 1969 (Pet. App. 31). The petition for a writ of certiorari was filed on June 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the employer promulgated and enforced a rule barring solicitation of union membership during working hours solely for the purpose of impeding its employees' union activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at page 3 of the petition.

STATEMENT

In February, 1967, the Union [1] began a campaign to organize the petitioner Company's employees (R. 70; J.A. 15-16, 27).[2] Clay Kinnaird, the president and general manager of the Company, held a meeting with some of the employees on March 14 and questioned the employees about their union activities

---

[1] Hotel, Motel, Restaurant and Club Employees Union, Local 750, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

[2] "R." refers to the transcript of record, and "J.A." to the Joint Appendix, in the court below.

(R. 70-71; J.A. 7-8, 18, 30, 38-39). He insisted that none of them would be allowed to leave until he "got to the bottom" of the union problem. Kinnaird also stated that those who belong to unions are "nothing but poor white trash or scum" (R. 71, 72; J.A. 9, 19, 31).

On March 27, the Union filed a petition for a representation election and, on April 24, the Company and the Union entered into a stipulation for certification upon consent election (R. 68). The day after the stipulation, the Company posted the following notice:

> ALL EMPLOYEES TAKE NOTICE:
>
> No Employee of Ridgewood Motor Hotel is Permitted to Solicit Union Membership During Working Hours on the Premises of Ridgewood Motor Hotel [R. 78; J.A. 9]

Prior to the posting of the notice, the Company had no rule against solicitation, and employees and supervisors had been permitted during working hours to conduct solicitations frequently, openly, and without restriction in the public areas of the motel (R. 78; J.A. 12-13). Such solicitations included candy sales, cake sales, contributions for departing employees, flowers for the families of deceased employees, church donations, football pools, and Christmas gifts for supervisors (R. 79; J.A. 13-15, 24-26, 32-33). In addition, outside salesmen were permitted to visit and sell various commercial articles to employees during working hours (R. 79; J.A. 13-15, 24-26).

During the time the no-solicitation rule was in effect, it was enforced (R. 79; J.A. 43). At the same

time, however, the resident manager and a labor relations consultant held interviews with the employees during working time, in an effort to persuade them that a union was not necessary (R. 81; J.A. 11-12, 49-51). The no-solicitation notice was removed from the bulletin boards on May 19, the day the Union lost the Board election (R. 79; J.A. 47).

The Board adopted the Trial Examiner's finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees concerning their union activities, and by promulgating and enforcing the no-solicitation rule solely for the purpose of impeding the Union's attempt to organize its employees (Pet. App. 6, 11-12). Accordingly, the Board ordered the Company to cease and desist from the unfair labor practices found, to rescind the no-solicitation rule, and to post appropriate notices (Pet. App. 20-23).[3] The court of appeals sustained the Board's findings and enforced its order (Pet. App. 27-30).

ARGUMENT

1. In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 803, n. 10 (1945), this Court recognized that a rule barring union solicitation during working time, while presumptively valid, violates Section 8(a)(1) of the Act if adopted for a discriminatory purpose. Here the Board found that the Company's no-solicitation rule "was designed

[3] In addition, because of the unlawful no-solicitation rule, the Board set aside the May 19 election which the Union had lost (Pet. App. 18).

to stifle the Union's campaign to organize the employees and was not necessary to maintain efficiency, order, or discipline" (Pet. App. 11). Thus, the only question actually presented is whether the court of appeals properly found substantial evidence to support the Board's finding. Such an issue does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1951); *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951). Moreover, the Board's finding of unlawful purpose is clearly justified by the evidence (see Pet. App. 12) that the rule was imposed at the outset of the Union's campaign and was annulled as soon as the Union lost the election, that the Company openly and freely permitted other solicitations by employees and outside salesmen during working hours, and that the Company, while barring union solicitation, utilized the employees' working time to conduct an anti-union campaign.[4]

---

[4] Contrary to petitioner's assertion (Pet. 8), the Board did not find that the Company's use of its premises for that purpose constituted an independent violation of Section 8(a)(1) of the Act; it merely took that factor into account in assessing the motive for the no-solicitation rule. The cases relied on by petitioner (Pet. 7-8) are factually distinguishable. Thus, in *TRW, Inc.* v. *National Labor Relations Board*, 393 F. 2d 771 (C.A. 6, 1968), the court found that "the evidence as a whole shows that the company guarded its working time carefully and exceptions to its no solicitation policy were made sparingly," and that the permitted solicitation "was strictly limited both as to time and designated periods during the year in order not to interfere with production" (p. 774); moreover, the employees were "free to converse on any subject during breaks and lunch periods," and assured that "no malice or

2. There is no merit to petitioner's contention (Pet. 4-7) that the court below erred in failing to consider whether the no-solicitation rule actually interfered with the Union's ability to communicate with the Company's employees. Where, as here, a no-solicitation rule has been promulgated for an unlawful purpose, the fact that the Union may have had available other avenues of communication is irrelevant. There is no occasion to consider the apparent conflict between such cases as *National Labor Relations Board* v. *United Aircraft Corp.*, 324 F. 2d 128 (C.A. 2, 1963), certiorari denied, 376 U.S. 951,[5] and *National Labor Relations Board* v. *Rockwell Mfg. Co.*, 271 F. 2d 109 (C.A. 3, 1959), for those cases differ from the instant case in that they involve instances in which the no-solicitation rule was not discriminatorily motivated.[6] Similarly, *National Labor Relations Board* v. *United Steelworkers*, 357 U.S. 357 (1958) dealt only with the "very narrow and almost abstract question" (357 U.S.

---

prejudice" would result from their union activity (p. 772). And, in *Serv-Air, Inc.* v. *National Labor Relations Board*, 395 F. 2d 557 (C.A. 10, 1968), the "rule was in effect for at least three and one-half years before any complaint was made" (p. 560).

[5] Accord, *Republic Aluminum Co.* v. *National Labor Relations Board*, 394 F. 2d 405 (C.A. 5, 1968); *United Steelworkers* v. *National Labor Relations Board*, 393 F. 2d 661 (C.A. D.C., 1968).

[6] In any event, *Rockwell* can be explained on its special facts; i.e., the employer's no-distribution rule was promulgated six years before the dispute, it "was premised on its desire to 'serve production, order and discipline,'" and the employer "enforced its no-distribution rule to maintain order." 271 F. 2d at 116.

at 362) whether an employer who validly adopted a no-solicitation rule commits an unfair labor practice by enforcing the rule against employees while he himself engages in anti-union solicitation; here, the rule itself was found to be invalid.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MICHAEL F. ROSENBLUM,
Attorney,
National Labor Relations Board.

JULY 1969.

---

[7] The other cases cited by petitioner (Pet. 6) are likewise distinguishable. *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621 (C.A. 6, 1965), concerned the validity of a provision of a collective bargaining agreement barring an outside union from distributing literature in the plant. And, *May Department Stores Co.* v. *National Labor Relations Board*, 316 F. 2d 797 (C.A. 6, 1963), like *Steelworkers, supra*, involved a lawful no-solicitation rule.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 357917 48